* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.REV.P. 554/2001

Reserved on : 03.4.2007
Pronounced on : 21.5.2007

DR. VIJAY MALLYA ..... Petitioner
Through:Mr. Ram Jethmalani, Sr. Advocate with Mr. Ajay Bhargava, Mr. Amit Desai, Mr. Jai Munim, Mr. Saurabh Gupta, Advocates.

versus

ENFORCEMENT DIRECTORATE ..... Respondent
Through Mr. P.P. Malhotra, ASG with Ms. Monika Garg, Mr. Chetan Chawala, Mr. Gaurav Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE S.RAVINDRA BHAT

1. Whether reporters of local papers may be allowed to see the judgment.? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

Mr.Justice S. Ravindra Bhat :

1. This revision proceeding impugns an order of the learned Additional Chief Metropolitan Magistrate, charging the petitioner of committing offences punishable under Section 56, Foreign Exchange Regulation Act, 1973 (hereafter called "FERA").
2. The criminal proceedings were initiated against the petitioner pursuant to a complaint filed on 8.3.2000. The Chief Enforcement Officer, FERA considered attendance of the petitioner, to be necessary, in connection with investigation and had issued summons

on several dates, viz 15.9.1999, 7.10.1999, 8.11.1999 and 21.12.1999, under Section 40 for his appearance together with documents such as his passport and correspondence etc. relating to an agreement. According to the complaint, an agreement, dated 1.12.1995 had been entered into by the petitioner with Flavio Briatore of M/s Benetton Formula Ltd., London. The complainant had required the petitioner's presence on 27.9.1998, 8.11.1999 and 26.11.1999. The complaint alleged that the petitioner accused failed to comply with the summons on different pretext despite their service. It was also alleged that Summons dated 21.12.1999 was issued in connection with the impending investigation for appearance of the petitioner on 3.1.2000 but it was returned back by the postal authorities with the remarks "refused". On the strength of the avermenets, it was alleged that the accused-petitioner had intentionally avoided appearing before the Enforcement Directorate knowing fully well that non-compliance with such directions rendered him for prosecution under Section 56 i.e a non-bailable offence.

3. In support of the complaint, seven prosecution witnesses were apparently examined; various documents were also exhibited at the pre-charge stage. The trial Court, after considering the materials and submissions on behalf of the petitioner, in the impugned order observed as follows :-

> *"I have carefully considered the arguments raised before me by both the Ld. counsel as well as documentary evidence produced by the parties. It is correct that summons dated 15.9.99 issued for 27.9.99 by regd. post in the name of Vijay Mallaya was received on 27.9.99 at about 2.00 p.m. for his appearance on 27.9.99 at 11.00 a.m. which is well proved from the statement of P.W.7. Hence I am fully satisfied that it was impossible for accused to appear before the concerned officer at 11.00 a.m. on*

27.9.99."

4. The trial Court considered the effect of the documents on record formed an opinion that a *prima facie* evidence existed for framing charges against the petitioner for committing offences under Section 56 FERA. The charges were framed as follows :-

> ***"CHARGE:***
>
> *I, V.K. Maheshwari ACMM New Delhi do hereby charge you Vijay Mallya, Chairman United Brewerries Ltd, 1, Vittal Lalya Road, Bangalore as under :*
>
> *That during the course of investigation four summons dated 15.9.99, 7.10.99, 8.11.99 and 21.12.99 were issued under Section 40 of FERA 1973 for your appearance in person before the officer of Enforcement and for the production of documents i.e your passport and all correspondence/contracts relating to Agreement dt. 1.12.1995 entered by you with Flavio Briatore representatives of M/s Benetton Fomula Ltd.(London) but you deliberately, intentionally and wilfully failed to comply with the summons issued under Section 40 of FERA, 1973 for which you were legally bound without any plausible reason or lawful excuse, thereby you committed offences punishable U/S 56 of FERA 1973 and within my cognizance."*

5. Mr. Ram Jethmalani, learned senior counsel contended that according to the complaint four summons were issued requiring the petitioner's attendance and that he with wilful intention disregarded them. Counsel contended that the impugned order and the charge as framed suffer from non-application of mind as the trial Court had recorded earlier that the summons of 15.9.1999, for attendance on 27.9.1999, was admittedly served later and could not have been possibly complied with.

6. Counsel contended that the petitioner in any event had furnished valid reasons why he could not comply with the summons. Reliance was placed upon two letters dated

13.10.1999, (in response to the summons dated 7.10.1999) and one dated 22.11.1999, (in response to the summons of 8.11.1999). It was submitted that the explanation for non-appearance, given on 13.10.1999 was that the petitioner was away from India, – which was accepted by the complainant unreservedly, leading to issuance of fresh summons. That summons, dated 8.11.1999 was acknowledged by a reply dated 22.11.1999, when the petitioner again sought exemption from appearance on 26.11.1999 as he was out of the country. It was contended that this request too was granted and the complainant no where stated that the explanation was not accepted. It was contended that the last summons dated 21.11.1999 could not be said to have been issued in accordance with the Foreign Exchange Rules, 1974, particularly Rule 3 as it was sent only by "Speed Post", not a prescribed mode.

7. Learned counsel submitted that the Court committed an error in framing the charge as did, and even, they otherwise are not in accordance with law because the order violates the mandate of Section 219(1) of the Code of Criminal Procedure (hereinafter the "Code") on two counts. Firstly, the trial Court proceeded to frame four charges, contrary to the mandate that in respect of separate offences, only three charges could be framed. It was secondly contended that even, otherwise, if for some reason it is held there could be a single trial for all three alleged offences, there should be three separate charges and a composite charge for three offences would prejudice the accused petitioner in the trial. Reliance was placed upon the judgments reported as *Jai Dayal Vs. State* AIR 1954 All 201 and *Atum Lengmi Vs. Manipur Administration* 1962(1) Crl.LJ 168, for the proposition that in such cases a composite

charge would vitiate the proceedings as it would cause prejudice to the accused. It was lastly contended that the main proceeding or trial for which the notices under Section 40 were issued concluded in favour of the petitioner and, therefore, allowing further criminal proceedings would be a futile exercise.

8. The petition was opposed by learned Additional Solicitor General Sh. P.P. Malhotra who submitted that the main ground urged during the hearing namely violation of Section 219 (1) of the Code has not even been averred in the pleadings. Counsel submitted that in every criminal trial the Court has to consider whether violation of procedure during the course of trial has the effect of prejudicing the accused or the trial, so as a result in miscarriage of justice. Counsel relied upon Section 464 of the Code to say that even after a final order or a finding, or sentence, mere omissions or irregularities in framing of charges including mis-joinder of charge would not vitiate or nullify the entire proceeding. The Court of appeal or revision would have to find whether such infirmity in fact occasioned a failure of justice. He also relied upon the judgments *Kamalanantha and Others Vs State of T.N.* 2005 (5) SCC 194 to say that in such cases the only consideration which the Court has to see as to whether the conduct of proceedings prejudiced an accused so fundamentally that there would be miscarriage of justice.

9. It was contended that framing of charge in respect of first summons could be rectified by this Court and the three charges in respect of the three dates, if clubbed together, cannot lead to prejudice just because they were framed in a composite manner; the accused is aware as to what charges he has to answer, specifically, in

regard to each failure to appear before the Enforcement Officer.

10. The above discussion would reveal that the petitioner, was allegedly issued with four summons on different dates, under Section 40, FERA. The relevant part of that provision reads as follows :

"Section 40(3) :

All persons so summoned shall be bound to attend either in person or by authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents as may be required."

11. The trial Court, in its discussion on the facts, noticed in Para 11 of its order that the summons dated 15.9.1999, for 27.9.1999 was received on that date at 2.00 PM. It had required his appearance on 27.9.1999 at 11.00 AM. Yet after so recording, it proceeded and framed a charge on that count. This was clearly erroneous.

12. So far as the arguments on behalf of the petitioner with regard to overlooking of explanation for his absence, or the non-compliance with the summons are concerned, to the extent they are a matter of record, they undoubtedly merited consideration; the trial Court did consider the two letters relied upon, by him. However, whether such explanation was justified and was correctly ignored, are issues which are the matter of defence. I find no merit in the contention urged in support of this petition, warranting interference with the impugned order, for that reason.

13. The main complaint, articulated during the hearing were the twin violation of Sections 219(1) of the Code. It was contended that the provision permitted clubbing

of three incidents whereas in fact four were put together; these vitiated the proceedings. Secondly it was urged that accusations regarding each incident had to be framed as a separate charge. As far as the first contention is concerned, in view of the earlier finding regarding error by the Magistrate including by the first incident, I am of the opinion that the suitable course would be to delete the first incident from the charge, as framed. The more substantial grievance aired relates to clubbing of several incidents and framing of a composite charge. Reliance was placed in this regard upon two decisions, of the Allahabad and Manipur High Court respectively. It is no doubt true that these decisions contain observations suggestive that the Court should avoid framing of composite charges as it would deflect attention of the Court from separate and distinct facts relating to each incident, while trying the case. What is to be noticed is that those judgments were rendered in the context of serious offences like dacoity, etc. where the aspect of prejudice would perhaps be felt in a more pronounced manner. In this case the offence is not so grave; the charges, even though framed in a composite manner list out separate dates and particulars, which are hardly likely to result in prejudice.

14. In this context it would be useful to extract Section 461 and 464 of the Code. They read as follows :

> *"**461. Irregularities which vitiate proceedings –** If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:-*
>
> *(a) attaches and sells property under section 83;*
> *(b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;*

(c) demands security to keep the peace;
(d) demands security for good behaviour;
(e) discharge a person lawfully bound to be of good behaviour;
(f) cancels a bond to keep the peace;
(g) makes an order for maintenance;
(h) makes an order under section 133 as to a local nuisance;
(i) prohibits, under section 143, the repetition or continuance of a public nuisance;
(j) makes an order under Part C or Part D of Chapter X;
(k) takes cognizance of an offence under clause © of sub-section (1) of section 190;
(l) tries an offender;
(m) tries an offender summarily;
(n) passes a sentence, under section 325, on proceedings recorded by another Magistrate;
(o) decides an appeal;
(p) calls, under section 397, for proceedings; or
(q) revises an order passed under section 446, his proceedings shall be void."

*"**464. Effect of omission to frame, or absence of, or error in, charge.-***
***(1)** No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.*

***(2)** If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may -*

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts, proved, it shall quash the conviction."

15. The Code has made a conscious distinction between irregularities that would not vitiate the proceedings (Section 460) and those which do so. The specific provision for omission to frame charges , mis-joinder of charges, is found in Section 464. The underlying theme of that provision is that unless miscarriage of justice is found by the Court, irregularity in the framing of charge or misjoinder of charges, do not authorize the Court to set aside the order on charge. Therefore, the recurring theme is that a omission or technical violation does not by itself constitute a fatal infirmity in charges framed and for the revisional or appellate Court to set aside such an order, there should be a positive finding of failure of justice. Having regard to the facts of this case, I am satisfied that no such failure of justice has been occasioned on account of the order on charge or the charge as framed.

16. As a result of the above discussion, the petition is allowed to the limited extent that the reference to the summons dated 15.9.1999, in the charge framed by the trial Court shall stand deleted. The order on charge shall be read as confined to the allegations pertaining to summons dated 7.10.1999, 8.11.1999 and 21.12.1999. The petition is allowed to that extent. The rest of the charges shall, however, remained undisturbed. In the circumstances, there shall be no orders as to costs.

May 21, 2007 (S. RAVINDRA BHAT)
mlb JUDGE